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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-856

SENATORS BARRY GOLDWATER, STROM THURMOND, CARL CURTIS, JAKE GARN, ORRIN HATCH, JESSE A. HELMS, GORDON HUMPHREY, JAMES A. MCCLURE, PAUL LAXALT; CONGRESSMEN ROBERT BAUMAN, STEVE SYMMS, LARRY MCDONALD, ROBERT DANIEL, JR., BOB STUMP, ELDON RUDD, JOHN ASHBROOK, GEORGE HANSEN, ROBERT K. DORNAN, JOHN H. ROUSSELOT, DON YOUNG, JAMES M. COLLINS, MICKEY EDWARDS, NEWT GINGRICH, DAN QUAYLE, CLAIR W. BURGENER, KENNETH B. KRAMER,
Petitioners,

v.

JAMES EARL CARTER, President of the United States,
CYRUS VANCE, Secretary of State,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

PRESIDENT JAMES EARL CARTER AND
SECRETARY OF STATE CYRUS R. VANCE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Barry Goldwater, *et al.,* respectfully pray that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, the concurring opinion, and the dissenting opinion are not yet officially reported; they are reproduced in Appendix A at page 1a, 33a, and 47a respectively. The District Court's memorandum opinions and orders of October

17, 1979, and June 6, 1979, are also unreported, and appear respectively at pages 107a and 140a of Appendix B.

JURISDICTION

The final judgment of the Court of Appeals was entered on November 30, 1979. This Court's jurisdiction is invoked under § 1254(1) of the Judicial Code, 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the President has the absolute power under the Constitution to terminate the Mutual Defense Treaty with the Republic of China, without any form of approval by the Legislative Branch?

The District Court stated the question and its context as follows:

> "The essential dispute concerns the constitutional validity of President Carter's unilateral notice of termination of the Mutual Defense Treaty [with the Republic of China], given on December 23, 1978. . . . According to the notice, the termination will be effective January 1, 1980 pursuant to the termination clause contained in Article X of the treaty. The President has not submitted, for the purpose of obtaining legislative concurrence, the notice of termination to either the Senate or the Congress as a whole. Instead the President maintains, and has continued to maintain, that he possesses the unilateral authority under the Constitution to terminate the Mutual Defense Treaty with the Republic of China.
>
> * * * * *

[1] References in this Petition are made to page numbers found in the accompanying temporary Appendix and not the printed Appendix to be filed.

> "The prime question confronting the Court in this case is what governmental action is required by the Constitution to terminate the 1954 Mutual Defense Treaty with Taiwan. Because that treaty contains a termination clause stating that notice of termination may be given by either party, the narrower issue becomes whether the President of the United States is a 'party' for purposes of this clause and thus able to take unilateral action with respect to the notice of termination." (Footnotes omitted.) (App. at 110a-111a; 125a.)

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

Relevant extracts from the constitutional, treaty, and statutory material involved in this case are set forth in Appendix C beginning at page 153a. They are:

Constitution, Art. I, sec. 8, cl. 18; Art. II, sec. 2, cl. 2; Art. II, sec. 3; Art. VI, cl. 2;

Mutual Defense Treaty of 1954, 6 U.S.T. 433;

International Security Assistance Act of 1978, § 26, 22 U.S.C. § 2151;

Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (1979), 22 U.S.C. §§ 3301, *et seq.;*

S. Res. 15 (Byrd Resolution), 96th Cong., 1st Sess. (1979), as adopted June 6, 1979, as a substitute for S. Res. 15, 96th Cong., 1st Sess. (1979), as amended and reported by the Senate Committee on Foreign Relations, 125 Cong. Rec. S7015 (daily ed. June 6, 1979); and

Summary of Treaty Termination Practice.

STATEMENT OF THE CASE

This is a suit brought by eight members of the United States Senate, a former Senator,[2] and 16 members of the House of Representatives, seeking a declaration that the President acted in excess of his constitutional powers in giving notice to the Republic of China of the termination of the Mutual Defense Treaty of 1954 between that country and the United States, without approval, in any form, by the Legislative Branch, and seeking injunctive relief.

On the merits, the District Court, in an opinion dated October 17, 1979, held:

> "Neither the executive nor legislative branch has exclusive power to terminate treaties. At least under the circumstances of this case—involving a significant mutual defense treaty with a faithful ally, who has not violated the terms of the agreement, and the validity of which has not otherwise been destroyed—any decision of the United States to terminate that treaty must be made with the advice and consent of the Senate or the approval of both houses of Congress.[3] That decision cannot be made by the President alone." (App. at 138a.)

The Court of Appeals, in a decision dated November 30, 1979, reversed, holding:

> "We find the President did not exceed his authority when he took action to withdraw from the ROC treaty, by giving notice under Article X of the Treaty, without the consent of the Senate or other legislative concurrences." (App. at 31a.)

[2] Senator Curtis' term of office ended after this suit was filed.

[3] Our footnote: The court analogized the requirement of action by the Senate to the treaty-making power, and said that the alternative requirement of action by both houses is based on congressional authority to repeal a law of the land, citing precedents for both alternatives. (App. at 131a-138a.)

The sequence of events prior to the decision of the District Court of October 17, 1979, was as follows:

The Mutual Defense Treaty of 1954, 6 U.S.T. 433 (App. at 155a), was signed December 2, 1954. The Senate gave its advice and consent to ratification thereof February 9, 1955. The treaty provides *inter alia* in Article V that each party will act to meet the common danger of an armed attack in the West Pacific area "in accordance with its constitutional processes." Article X of the treaty provides:

> "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party."

On September 26, 1978, President Carter signed into law the International Security Assistance Act of 1978, 92 Stat. 746, 22 U.S.C. §§ 2151 *et seq.* (App. at 157a.) Section 26 of that Act provides:

> "Sec. 26. (a) The Congress finds that—
>
> "(1) the continued security and stability of East Asia is a matter of major strategic interest to the United States;
>
> "(2) the United States and the Republic of China have for a period of twenty-four years been linked together by the Mutual Defense Treaty of 1954;
>
> "(3) the Republic of China has during that twenty-four-year period faithfully and continually carried out its duties and obligations under that treaty; and

"(4) it is the responsibility of the Senate to give its advice and consent to treaties entered into by the United States.

"(b) It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."[4]

On October 15, 1978, Congress adjourned. On December 15, 1978, while Congress was not in session, and without exercising his power to call a special session, President Carter publicly announced his unilateral decision to terminate the Mutual Defense Treaty with Taiwan, and to effect that decision by invoking Article X thereof.

This suit was filed one week later, on December 22, 1978. Notice was given to Taiwan the next day, December 23, 1978, that the Mutual Defense Treaty would terminate pursuant to Article X thereof on January 1, 1980.

On January 15, 1979, the first legislative day of the new Congress, Senator Harry F. Byrd offered Senate Joint Resolution 3, which he subsequently reintroduced on January 18, 1979, as Senate Resolution 15. (App. at 166a.) Each time the Majority Leader objected to immediate consideration. The resolution provided:

"That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."

[4] Subsection (b) was added in the Senate by a vote of 94-0. 124 Cong. Rec. S11726-27 (daily ed. July 25, 1978).

On April 10, 1979, the President signed the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, 22 U.S.C. §§ 3301, *et seq.* Section 15 of that act expressly confirms the continuing existence of a government of Taiwan, notwithstanding recognition of the People's Republic of China:

"[T]he term 'Taiwan' includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, *and the governing authorities on Taiwan* recognized by the United States as the Republic of China prior to January 1, 1979, *and any successor governing authorities* (including political subdivisions, agencies, and instrumentalities thereof)."[5] (Emphasis added.)

And section 4(c) explicitly provides that all treaties with the government of Taiwan shall remain in force until lawfully terminated:

"For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law."

Some 60 treaties and other international agreements between the United States and the Republic of China, including the Mutual Defense Treaty, are now in force. Department of State, *Treaties in Force* at 230-33

[5] See also section 4(b) of the Taiwan Relations Act.

(January 1979). The notice of termination related only to the Mutual Defense Treaty.

On June 6, 1979, the District Court dismissed Plaintiffs' complaint without prejudice on the ground that plaintiffs lacked standing. (App. at 140a.)

The Senate reacted immediately. In the District Court's words:

> "On June 6, 1979, within hours after the Court's initial ruling in this case, the United States Senate voted 59 to 35 to adopt an amendment proposed by Senator Harry F. Byrd, containing language identical to original Senate Resolution 15, as a substitute for the substitute amendment proposed by the Senate Foreign Relations Committee. 125 Cong. Rec. S7038-7039 (June 6, 1979). The language adopted by the Senate vote reads as follows:
>
> > "That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."[6]
>
> (Footnotes omitted.) (App. at 116a-117a.)

As the District Court said:

> "By that vote, the Senate rejected a Committee substitute that would have expressly approved of the action taken by the President in terminating this treaty." (Footnotes omitted.) (App. at 118a.)

[6] The Senate Foreign Relations Committee on May 1 had reported S. Res. 15 with an amendment to strike all after the resolving clause and insert substitute language providing several grounds for unilateral Presidential termination of treaties, including cases where a treaty has a termination clause. 125 Cong. Rec. S5018. It was this substitute Committee amendment that was rejected by the Senate and replaced with the Byrd amendment on June 6.

The District Court noted that the 59-35 vote of June 6, 1978, in favor of the Harry F. Byrd resolution, also "stands as the last expression of Senate position on its constitutional role in the treaty termination process." (App. at 118a.)

On June 12, 1979, Plaintiffs moved for reconsideration of the District Court's June 6 order, and hearing was held on July 12, 1979.

On October 17, 1979, the District Court issued its decision, holding that Petitioners have standing, that the case presents a justiciable controversy, and, on the merits, that the President's action violated the Constitution.

The Court of Appeals, on November 30, 1979, after a hearing *en banc,* in a *per curiam* opinion, reversed the District Court on the merits (Judge MacKinnon dissenting), while sustaining that court's holding as to standing (Judges Wright and Tamm dissenting), and as to justiciability.[7]

Both the District Court and the Court of Appeals recognized that there is a gap in the Constitution with respect to termination of treaties. They differed as to how this gap is to be filled. The District Court reasoned that the principle of separation of powers and the system of checks and balances which permeates the Constitution was not intended by the Framers to be displaced in this one instance. The Court of Appeals, on the other hand, reasoned that the foreign affairs power is constitutionally lodged in the Executive and was intended to be exercised without restriction, unless expressly stated, and since the Constitution does not

[7] The court said: "There are no votes to reverse founded on the political question doctrine." (App. at 2a.)

expressly impose such a restriction (*e.g.*, concurrence by the Legislative Branch) the Executive has power to terminate a treaty without the consent of the Senate or the Congress.

Both courts took note of the provision of Article X of the treaty which gives either "Party" the right to terminate on one year's notice. The District Court construed "Party" to mean "government," not "President," and therefore concluded that the privilege of termination must be exercised through constitutional processes, which, as previously indicated, connote a power shared by the Executive and Legislative Branches.

The Court of Appeals, on the other hand, reasoned that the termination clause does not designate who shall act, and, since no specific role is spelled out in either the Constitution or this treaty for the Senate or Congress as a whole, the power of termination consequently devolves on the President.

Chief Judge Wright and Judge Tamm concurred in the result of the judgment, arguing that Petitioners lacked standing to bring the suit. The majority opinion answered this argument in some detail.

The dissenting opinion of Judge MacKinnon in the Court of Appeals argued that the Constitution requires that the termination of a treaty be approved by both Houses of Congress, reasoning that since the supremacy clause (Article VI) makes a treaty, along with the Constitution and acts of Congress, the supreme law of the land, a treaty, like a statute, can only be repealed by a statute. His opinion contains an exhaustive analysis of writings of Framers of the Constitution, as well as the practice followed in the termination of treaties, which he finds, in 52 cases out of 54, to have received the concurrence of Congress.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, but Should Be, Settled by This Court.

The Court of Appeals, in sustaining the President's authority to exclude Congress from participation in the decision to terminate a mutual defense treaty, has made an important and unprecedented allocation of constitutional powers between the Executive and Legislative Branches of the Federal Government. No other president has claimed such authority. No other court has ever asserted that he possesses it. The singular gravity of the question, and of the Court of Appeals' resolution of it, cannot be swept under the rug, by attempting (as the Court of Appeals did) to restrict the scope of the opinion to this one treaty.

A notice of termination clause similar to Article X of the Mutual Defense Treaty with Taiwan appears in at least four other mutual defense treaties: the NATO Treaty of April 4, 1949, Art. 13, 4 Bevans 828; the Security Treaty with Japan of January 19, 1960, Art. X, 11 U.S.T. 1758; the Mutual Defense Treaty with the Philippines of August 30, 1951, Art. VIII, 3 U.S.T. 3947; and the Mutual Defense Treaty with Korea of October 1, 1953, Art. VI, 5 U.S.T. 2368. And at least five other major treaties identified with national defense contain similar clauses: the Nuclear Test Ban Treaty, Art. IV, 14 U.S.T. 1313; the Statute of the International Atomic Energy Agency, Art. XVIII, 8 U.S.T. 1093; the Nuclear Non-Proliferation Treaty, Art. X, 21 U.S.T. 483; the Biological Weapons Convention, Art. XIII, 26 U.S.T. 583; and the Outer Space Treaty, Art. XVI, 18 U.S.T. 2410.

The reason for the absence of judicial precedents [8] is that never before in the history of the Republic has a President attempted to terminate a mutual defense treaty or any other important treaty without the approval of Congress. Indeed, the only mutual defense treaty which this country has ever terminated was the 1778 treaty of alliance with France, which was terminated directly by an act of Congress,[9] without any direct communication by the President to France. (App. at 51a.)

If the President has constitutional power to terminate the Mutual Defense Treaty with Taiwan, acting alone, any future president, acting alone, can terminate any of the important treaties mentioned above, subjecting the United States to hazards from which

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[8] While no court has ever decided the question presented by this case, there are strong dicta in two opinions of this Court to the effect that treaty termination is a shared power. In the *Amiable Isabella*, 6 Wheat. (19 U.S.) 1 (1821), this Court said:

> "[T]he obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority." *Id.* at 75.

And in *Clark* v. *Allen*, 331 U.S. 503 (1947), the Court quoted with approval the following statement by Judge Cardozo in *Techt* v. *Hughes*, 229 N.Y. 222, 243; 128 N.E. 185, 192 (1920), *cert. denied*, 254 U.S. 643 (1920):

> "[T]he President *and* senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts." *Id.* at 509 (Emphasis added).

[9] It is notable that this statute followed some six years after Thomas Jefferson, as Secretary of State, had cautioned President Washington that the termination of an alliance was the most certain way of making a bitter enemy out of a friend. He specifically cautioned that withdrawal from an alliance would give "just cause" for war by the other nation. 6 The Writings of Thomas Jefferson 225, 231 (P. Ford ed. 1895).

the Senate intended to protect our country by granting its advice and consent to their ratification. *See* dissenting opinion of Judge MacKinnon at App. 56a, 90a-92a. The importance of a novel decision vesting such power in one man, free of the checks and balances of the Constitution, needs no elaboration. It cries for review by this Court.

II

The Decision Below Expands the Concept of the President's Foreign Affairs Power on an Unprecedented Scale.

The Court of Appeals decision is based on 10 enumerated "considerations." The decision is noteworthy in that it does not identify any single reason or theory for its conclusion that the Constitution does not require legislative participation in the termination of the Mutual Defense Treaty. Rather, the court relied on what it termed the "totality" of "various considerations." App. at 14a-15a. The opinion, in the court's own words, does not indicate "that any one factor or combination of factors is determinative." *Id.* They are somehow all "knit together" (App. at 29a) in a fashion that forms a patchwork quilt which would robe the Presidency in power never before claimed by any other president or declared by any other court. The decision also makes sweeping statements of presidential power that could prove dangerous in areas other than treaty termination. The "considerations" underlying the court's opinion are unsupported by any historical precedent. Incredibly, the intent of the Framers is nowhere mentioned in the court's opinion. The basic judicial support is Justice Sutherland's "oft-repeated" *dictum* in *United States* v. *Curtis-Wright Export Corp.*,

299 U.S. 304, 319 (1936), that the President is the "sole organ" in foreign affairs; that dicta has now been stretched to mean that the president is the "sole maker" of foreign policy. The principal authority and overriding theme of this decision is that expediency legitimizes the President's action.

Petitioners believe that a brief analysis or review of these 10 reasons in the decision will clearly demonstrate that the Court of Appeals' manner of reasoning does violence to this Court's consistent and careful analytical approach to constitutional interpretation. For that reason, the decision below demands review.

1. The substance of the Court of Appeals' first consideration is that since the appointment clause and treaty clause both contain a role for Senate participation, and since some purely executive officers, such as Ambassadors or Postmasters, can be removed by the President alone, the President is thereby granted some authority to similarly "remove" or terminate treaties. As Judge MacKinnon correctly remarked:

> "That this point is made in a serious vein is unbelievable and illustrates lack of depth of analysis." (App. at 100a.)

The Court of Appeals, while professing to avoid "abstract logic or sterile symmetry" does exactly that by trying to compare the "appointment" clause with the treaty clause. But even if one were to compare the powers of the two branches under each clause, the comparison support petitioners' position. As Professor Arthur Bestor has written:

> "[I]f the analogy [between the removal power and the treaty power] is to be appealed to at all, it is more convincing when applied the other way round . . . . The President's ability to take care that the laws be faithfully executed may well be said to depend on his possession of removal power. But a power to change the law (whether established by statute or treaty) is something utterly different—a contradiction rather than a corollary of the responsibility for seeing to its faithful execution." Arthur Bestor, "Location of the Constitutional Power to Abrogate or Terminate a Treaty: The Original Intent of the Constitution Historically Examined," 125 Cong. Rec. S 1607, 1609 (daily ed., February 21, 1979).

2. Next, the court reasons that, because the primary purpose of the Supremacy Clause is to make the Constitution, federal law, and treaties superior to state law, the clause does not afford the basis for a determination that a treaty must be terminated either (1) by the same process by which it was made, or (2) by the process by which statutes are terminated.

The conclusion simply does not follow from the premise. Federal statutes are part of the Supreme Law of the Land, yet they are repealed by the same process by which they are made (although the Constitution does not expressly say so). Why should treaties, which are on an equal footing with statutes, be any different?

Moreover, the use of the Supremacy Clause has been extended to matters other than conflicts between Federal and state law. For example, it has been used to reconcile conflicts between treaties and Federal stat-

utes,[10] and to determine the operative effect of treaties.[11] Thus, the mere fact that this case does not involve a conflict with state law does not prevent the use of the Supremacy Clause in the constitutional construction necessary to the resolution of the question presented in this case.

3. The Court of Appeals argues that it does not follow "that a constitutional provision for a special concurrence (two-thirds of the Senators) prior to entry into an entangling alliance necessarily applies to its termination in accordance with its terms." (App. at 18a).

This statement is a contradiction of everything known about the intent of the Framers and Founders of our government and is unsupported by any citation to the Framers or Founders. The court three times uses the emotionally charged term "entangling" alliance as a cover for its lack of historical evidence.

Actually, the Framers were as much concerned with preserving treaties, including treaties of alliance, as they were with making it difficult to initially enter into such agreements. Gouverneur Morris specifically said at the Constitutional Convention that "the more difficulty in making treaties, the *more* value will be set on them." 2 *Records of the Federal Convention of 1787,* at 393 (M. Farrand ed. 1937) (emphasis added) Thomas Jefferson warned, in an official opinion written as Secretary of State a mere six years after the convention, that the termination of an alliance was the most certain way of making a bitter enemy out of a

[10] *See, e.g., Whitney* v. *Robertson,* 124 U.S. 190 (1888).

[11] *See, e.g., Foster* v. *Neilson,* 2 Pet. 253 (U.S. 1829).

friend. He specifically cautioned that withdrawal from an alliance would give "just cause for war" by the other nation. 6 *The Writings of Thomas Jefferson* 225, 231 (P. Ford ed. 1895).

The Founders' fear of giving cause for war by termination of an alliance and their well-known preoccupation with preserving valuable and hard won treaty rights, such as fisheries or navigation, prove beyond any question that the unmaking of treaties was not vested as an absolute power in a single officer of government.

4. The Court of Appeals uses the general language of Article II, section 1, of the Constitution, as a basis for finding the existence of a broad presidential power to abrogate treaties generally. The court concludes that the "powers conferred upon Congress in Article I of the Constitution are specific, detailed, and limited, while the powers conferred upon the President by Article II are generalized in a manner that bespeaks no such limitation upon foreign affairs powers." (App. at 18a-19a). From this, the court says that it "would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties, similar to the specific one relating to initial approval." (App. at 20a).

The Court of Appeals itself attempts an unprecedented feat of construction by transforming the sparse enumeration of executive powers of Article II into an absolute power of treaty termination which the Framers unmistakably omitted from the text. It is beyond dispute that the Framers were distrustful of executive power and shrank from placing kingly authority

anywhere. Madison emphasized at the Constitutional Convention that the Framers meant "to *fix the extent* of the executive authority," not to confer open-ended powers. 1 *Records of the Federal Convention of 1787,* at 66 (M. Farrand ed. 1937). (emphasis added) Madison added that "executive powers [should] be confined and defined—if large we shall have the Evils of elective Monarchies." *Id.* at 70.

The underlying question in this case is whether Article II of the Constitution shall be construed as delegating to the President all executive power, including what has been called the foreign affairs power, without restraint unless a specific restriction can be found in the Constitution as the Court of Appeals believed, or shall be construed as delegating to the President only such powers as are consistent with the system of divided powers and checks and balances of the Constitution as a whole, as the District Court firmly held.

The rationale of the Court of Appeals' opinion in this respect is clearly in conflict with that of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), which rejected a similar argument (that executive power under Article II is plenary unless expressly limited in the Constitution), offered to justify the President's seizure of the Nation's steel mills without statutory authority.

Justice Black, writing for the Court, said:

> "It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from

> the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in article II which say that 'The executive Power shall be vested in a President . . .'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.' *Id.* at 587.

Rejecting this argument, Justice Black continued:

> "Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.*

And so the theory of "the aggregate of his powers under the Constitution" (reasserted by the Court of Appeals here in strikingly similar language) was rejected.

Justice Frankfurter in his concurring opinion went at it from another direction: that the constitutional concept of checks and balances was controlling. Speaking of the intent of the Framers, he said:

> "To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or

sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 593-94.

Justice Frankfurter might have been speaking of the present case when he said:

> "Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law." (*Id.* at 603-04).

Justice Jackson, referring to the argument that Article II is a delegation of all executive power not specifically restricted, said:

> "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." *Id.* at 641.

Justice Jackson also attacked the notion, repeated in the President's brief in the Court of Appeals, that there had been an aggregation of powers in the President, from custom, never judicially tested:

> "The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting

> power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.
>
> "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings.
>
> "The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. . . ." *Id.* at 646-47.

The instant case presents again the choice between a claim of inherent powers in the President, unchecked unless a specific restraint be found in the Constitution, and a concept of checks and balances among the three branches of government which is a general restraint upon all powers of the Executive, whether or not explicitly so restrained.

The Court of Appeals decision in this case cannot be affirmed without unsaying the key utterances of the Justices' opinions in the *Youngstown Sheet and Tube* case.

5. The next "consideration" identified by the Court of Appeals is its conclusion that the Constitution confers primary responsibility for the international aspects of treaty making on the President, and primary

responsibility for the domestic aspects of treaty making on the Congress. However, this conclusion detracts from, rather than supports, the notion that Congress can be by-passed or excluded from the domestic processes of treaty termination.

The respective roles of Congress and the President in the domestic and international aspects of treaty termination have been identified and analyzed by Professors McDougal and Reisman in a series of recent articles.[12] As explained by McDougal and Reisman, and as the District Court noted (App. at 131a), it is an unrealistic simplification to view treaty termination as a single act. In fact, treaty termination usually involves at least four distinct, sequential acts: (1) the formulation of the policies to terminate, (2) negotiations with the other party, (3) repeal of the law of the land, and (4) notice of the termination. Two of these sequential acts—negotiation and notice of termination—are within the exclusive competence of the President. But Congress has always had competence in the acts of policy determination and repeal of the law of the land. This conclusion is indicated by repeated statements of the Framers and Founding Fathers, which are nowhere mentioned in the Court of Appeals' opinion, and in the subsequent practice of the federal government in treaty termination during the past 200 years.

6. The Court of Appeals states that in "many . . . situations the President must take immediate action" to terminate treaties. From this policy observation, the

[12] Reisman & McDougal, "Who Can Terminate Mutual Defense Treaties?", The National Law Journal 19 (May 21, 1979); *id.* at 17 (May 28, 1979); *id.* at 15 (July 23, 1979).

court draws the conclusion that congressional participation in termination would "deny the President the authority necessary to conduct our foreign policy in a rational and effective manner." (App. at 22a).

The practice of finding a power based on political expediency was condemned by Chief Justice John Marshall, who wrote:

> "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." *John Marshall's Defense of McCulloch* v. *Maryland* at 190-91 (G. Gunther ed. 1969).

The doctrine of judicial construction put forth by the Court of Appeals would serve as the means for Presidential usurpation of all powers belonging to other branches of government. If the President alone is allowed to make for the nation the final decision of when he "must take immediate action" in order to conduct foreign affairs "in a rational and effective manner," he becomes the ultimate arbiter of his own powers, free of any judicial responsibility to say what the law is.

The basic conclusion of the Court of Appeals is also flawed because there is nothing in a requirement of congressional participation to prevent his immediate action. He may exercise his routine authority to submit a Presidential message to the Congress asking for immediate action on his request for a grant of authority. He may call a special session of the Congress for such purpose if that body has adjourned. Or he may act immediately to give notice of termination and promptly thereafter seek congressional ratification of his action.

7. The Court of Appeals indicates there is no settled consistent method by which the legislature has been involved in treaty termination (App. at 22a-23a). What *is* settled is that, regardless of the various legislative methods of granting authority (concurrent resolution, Senate resolution, act of Congress, etc.) or their timing (before or after the notice of termination), there have been *two and only two sources* of legislative authority: a majority (or greater) approval of both Houses of Congress, or two-thirds (or greater) approval by the Senate.[13] The court thus ignores the critical fact that the Legislative Branch has participated in virtually all cases of treaty termination, and that this is the first case in history in which a President has deliberately sought to exclude the Legislative Branch from any participation at all.

While some 54 treaties to which the United States is a party have been terminated by the United States, there has never been an occasion, until now, for anyone to challenge the constitutionality of what was done. This is because, in all but two cases, the President acted at the direction of or with the concurrence of Congress, expressed in one form or another. The exceptions can be "readily distinguished," as the District Court found

[13] Thirty-nine treaties were terminated upon the initiative of Congress. Four others were terminated with legislative approval after express Presidential requests for such authority. In two others, Congress expressly or impliedly authorized the President to take action which nullified an earlier treaty. In seven instances, Congress enacted statutes inconsistent with extant treaties, necessitating withdrawal from those agreements. In these 52 cases, therefore, the President was not asserting a power to exclude Congress from participation in treaty termination (as here), and there was therefore no occasion for a challenge. See Summary of Treaty Terminations, App. at 167a and the dissenting opinion of Judge McKinnon, App. at 63a, *et seq.*

(App. at 127a), and in any event they scarcely could create a new constitutional power. As Judge McKinnon's powerful dissent states:

> "On examination it appears that among the 13 instances upon which the President relies, there were only two minor treaties in which the President could be said to have acted alone since 1788. Reliance upon such miniscule precedent forcibly illustrates the great weakness in the President's claim to *absolute power* in the present circumstances involving a Defense Treaty.
>
> "Also, practically all of the 13 instances upon which the President relies were of such minor impact, or so non-controversial and widely approved that no person would have suspected that such instances would later be claimed as precedents to support an *absolute* Presidential unilateral power to terminate major defense treaties. An evolution of such great power from so little was never broached or envisioned. Thus does even minor usurpation gnaw away at constitutional rights. Fortunately, however, the imprimatur of law is not lightly awarded. Even the enactment of many statutes and lengthy acquiescence by Congress and the President in constitutional infractions will not support a non-existent power or unwarranted constitutional construction. *Field* v. *Clark,* 143 U.S. 649 (1892); *James* v. *U.S.,* 202 U.S. 401 (1903); *U.S.* v. *Boyer,* 85 Fed. 425 (D.C. Mo. 1898). Usurpation does not make constitutional that which is unconstitutional." (*Id.* at 90a-91a) (emphasis in original).

The next point made by the majority is that:

> "There is . . . widespread agreement that the President has the power as Chief Executive under many circumstances to exercise functions regarding treaties which have the effect of either terminating or continuing their validity." (Footnote omitted.) (App. at 23a).

In support of this proposition, the court cites a report of the Senate Foreign Relations Committee which lists 14 situations in which a state under international law may withdraw from or suspend a treaty. Here, the court has confused the right of the United States under international law to withdraw from a treaty, and the right of the President under the Constitution to effect such withdrawal by the United States. There is widespread agreement that a state may withdraw from a treaty in conformity with its provisions; and, in the present case, there is no question that the United States under international law may withdraw from the Mutual Defense Treaty pursuant to Article X. However, there is clearly no widespread agreement to the effect that the President under the Constitution may make the decision to withdraw from a treaty without legislative consent. Indeed, the Senate on June 6, 1979, expressly rejected the Senate Foreign Relations Committee's resolution which would have given the President the power to act without legislative consent to terminate a treaty in any of the 14 situations where a right of termination may exist under international law.

8. The Court of Appeals cannot find any "judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards." From this, the court concludes it cannot "lay down any hard and fast constitutional rules." (App. at 26a.)

First, the court could easily lay down the general rule, as did the District Court, that "some form of congressional concurrence is required" in terminating all treaties. (App. at 136a). By adopting such a rule,

the court would not need to involve itself in making any of the difficult distinctions it foresees. It would be merely confirming that the predominant past practice is constitutionally based.

Second, the court ignored at least two strong grounds for making a distinction (if one needs to be made) in the case at bar based on the clear legislative history of the Mutual Defense Treaty and the status of the treaty as a defense alliance. The setting in which the treaty was concluded proves that congressional concurrence was required for its termination by the United States. The U. S. Ambassador to the Republic of China at the time the treaty was negotiated states that "it never dawned on the negotiators that the treaty would be terminated by the President acting alone." 125 Cong. Rec. S15797 (daily ed. Nov. 2, 1979). Moreover, the treaty clearly involves, and directly impinges on, the power of the Congress to declare war and to appropriate funds for the common defense.

In short, the role of the judiciary is not difficult or improper in this case.

9. The Court of Appeals also states that the recognition power of the President is "an important ingredient in the case at bar," but denies that it "automatically gives the President authority to take any action that is required or requested by the state being recognized." (App. at 28a.) Nevertheless, the court, in effect, uses this power as a bootstrap for the President, acting alone, to comply with all demands of the foreign government, including the unilateral termination of a mutual defense treaty. *Id.*

Two mutually inconsistent arguments are given as to the effect of recognition of the PRC on the treaty.

One argument is that recognition of the People's Republic, without taking exception to its claim to be the sovereign over Taiwan as well as the mainland, ipso facto, gives the President power "to determine that there is no meaningful vitality to a mutual defense treaty when there is no recognized state." *Id.* This conflicts with what the court itself recognizes elsewhere the President in fact did, which was to deem that treaty as continuing in effect, despite his recognition of the People's Republic, by asserting, "on behalf of the United States, the privilege of terminating the Treaty by appropriate notice as provided by its own terms." (App. at 3a, n.2).

The other argument is that "the United States has evolved for Taiwan . . . a novel and somewhat indefinite relationship, namely, of unofficial relations with the people of Taiwan." (App. at 28a.) The direct refutation of the premise of this argument is the testimony before the Senate Foreign Relations Committee on February 8 of this year by two high level State Department officials who said that the United States can and will implement and carry out its obligations under the treaty until 1980, even though we have an unofficial relationship with Taiwan.

In response to the question by Senator Muskie of how the United States could "implement" a defense treaty with a nation we do not recognize, Roger Sullivan, Deputy Assistant Secretary of State for East Asian and Pacific Affairs testified:

> SULLIVAN: If there were any threat to the security of Taiwan we could consult with *the authorities* on Taiwan. We would find a way to consult.

Hearings on the Taiwan Relations Act, S.254 Before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. at 688 (1979) (emphasis added).

When asked by Senator Glenn to respond to the same question, Herbert Hansell, the Legal Adviser of the State Department testified:

> HANSELL: . . . we would find the means to do it, unofficial or otherwise, to perform our obligations under the treaty. * * *
>
> The fact of the matter is we would find the mechanism to do whatever had to be done regardless of whether it was official or unofficial channels. *Id.*

Senator Muskie then summed up this colloquy:

> MUSKIE: What you are saying then is that the treaty is still binding on us for that year (1979)?
>
> SULLIVAN: Yes, sir, *absolutely.*
>
> MUSKIE: *In the fullest sense?*
>
> SULLIVAN: Yes, sir.

Id. (emphasis added)

What is presently significant is that (1) this Court has never held that the recognition power is ground for treaty termination, or anything like it, and (2) if the argument were accepted that the President derives power from the demands of a foreign government that the Constitution does not otherwise give him, to be exercised free of any participation by the Legislative Branch, the powers of the Presidency would have no limit. For example, if the Soviet Union, taking a leaf from the book of the People's Republic, were to demand that the President (acting alone) should give

notice of termination of the NATO treaties, as a condition to continuance of our recognition of the Soviet Union (and their recognition of the United States), would the President have the constitutional power to dissolve those safeguards to the national defense? Apparently he would, unless the decision of the Court of Appeals is reversed.

10. The final consideration by the Court of Appeals, stated to be of "central significance" and an "overarching factor", is the fact that the Mutual Defense Treaty (like most other United States treaties) contains a termination clause, and thus, the President's power was at its "zenith" in terminating the treaty. Such a characterization of Presidential power completely distorts this Court's teachings, especially that in *Youngstown Sheet & Tube* v. *Sawyer,* 343 U.S. 579 (1952), wherein it was stated that the President's power is at its "lowest ebb" in circumstances comparable to the case at bar. *Id.* at 637 (Jackson, J. concurring).

The Court of Appeals recognized that the President acted "without the consent of the Senate or other legislative concurrences." (App. at 31a). Indeed, in view of the historically based practice of a shared-role in treaty termination; the passage of the Dole-Stone Amendment calling for prior consultations before the termination of this treaty; the Taiwan Relations Act, specifically preserving all treaties with Taiwan without exception; and the Senate vote on June 6, 1979 for the Harry Byrd substitute amendment, the President's action here is in *conflict* with Congressional expression.

The absence of an express condition in the Mutual Defense Treaty spelling out a role for the Senate or

the Congress for its termination is also not significant since it was generally understood from past practice that termination of treaties, including those with termination clauses similar to that here, required approval of the Congress, or at least the Senate.[14] Furthermore, the absence in the Constitution itself of a provision for treaty termination does not mean that the "power consequently devolves upon the President" as the Court of Appeals would have it. This Court clearly stated in *Youngstown Sheet and Tube* that the President is *not presumed* to have the power to act in any particular circumstance. His power "*if any,* . . . must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. It cannot stem from or be created out of a gap in the Constitution.

CONCLUSION

This case presents an important question of federal constitutional law which has never been decided by this Court. Failure to review the decision of the Court of Appeals would also let stand a dangerous precedent for Executive usurpation of Congress' historically and constitutionally based powers. For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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[14] Significantly, the first treaty terminated pursuant to its terms was in 1846 when Congress enacted authority for President Polk to give notice of termination of the Oregon Territory Convention with Great Britain. 9 Stat. 109-110.

Respectfully submitted,

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